

ADVISORY OPINION 2006-001

Any advisory opinion rendered by the Registry under subsection (1) or (2) of this section may be relied upon only by the person or committee involved in the specific transaction or activity with respect to which the advisory opinion is required. KRS 121.135(4).

March 9, 2006

Jan Witold Baran
Wiley Rein & Fielding LLP
1776 K Street NW
Washington, D.C. 20006

Dear Mr. Baran:

We received your written request for an advisory opinion on February 8, 2006, on behalf of your client, the Chamber of Commerce of the United States of America (the “Chamber”).

In your request, you provided us the following facts: The Chamber is an incorporated not-for-profit trade association that is exempt from federal income taxation pursuant to section 501(c)(6) of the Internal Revenue Code. The Chamber is made up of members which are business corporations of all sizes and from all sectors of the economy. One of the Chamber’s functions is to advance the interests of its members by educating the public on issues the Chamber deems important.

To do so, the Chamber engages in mass media communications that may refer to clearly identified candidates for electoral office, but do not expressly advocate their election or defeat. Instead, the communications eschew words such “vote for,” “defeat,” or “reelect.” In addition, the Chamber does not coordinate its efforts with any of the candidates identified in the communications or with their opponents. The Chamber

intends to engage in a public educational program of this sort in Kentucky and, therefore, you have raised the following questions.

- (1) Does the Registry's Staff Report and Recommendations in Sandy Jones v. Alan Baker et al. (KREF Case No. 2004-207) constitute an accurate interpretation of the phrase "express advocacy" such that the Chamber's proposed activities will not subject the Chamber to regulation as a "permanent committee" or any other provisions under Chapter 121 that incorporate the "express advocacy" standard?

The Kentucky Supreme Court has instructed that any First Amendment analysis of KRS Chapter 121 necessarily begins with Buckley v. Valeo, 424 U.S. 1 (1976). Martin v. Commonwealth, 96 S.W.3d 38, 46 (Ky. 2003). See also Anderson v. Spear, 356 F.3d 651, 665 (6th Cir. 2004) ("To understand the difference between express advocacy and issue advocacy, we must look to the seminal case of Buckley....")

In Buckley, the U.S. Supreme Court construed the expenditure limitations and disclosure and reporting requirements under federal law "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." Buckley, 424 U.S. at 80. To avoid vagueness and overbreadth, a bright statutory line was established to separate "express advocacy" from "issue advocacy." McConnell v. Federal Election Comm'n, 540 U.S. 93, 126 (2003). Under this bright-line test, the Court identified examples of certain "magic words" that are essential in determining express advocacy, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," or "reject." Buckley, 424 U.S. at 44, fn 52. Subsequent cases have consistently limited the regulation of political speech to those expenditures constituting express advocacy. See e.g., First National Bank of Boston v. Belotti, 435 U.S. 765 (1978); and Federal Election Comm'n v. Massachusetts Citizens For Life, 479 U.S. 238 (1986). Communications which do not constitute express advocacy, as defined by this test, are considered constitutionally-protected First Amendment speech and may not be subject to government regulation. This is based on the fact that "the government may not regulate a broader class of speech than is necessary to achieve its significant interest." Anderson, 356 F.3d at 665.

By Order dated August 26, 2005, the Registry Board adopted and approved the recommendations and analysis set forth in the Staff Report and Recommendations in Sandy Jones v. Alan Baker et al. (KREF Case No. 2004-207). Such order thereby confirmed that the "express advocacy" standard as set forth under Buckley is the proper standard for analysis of the disclosure and reporting requirements under KRS Chapter 121. As stated in the above-referenced Staff Report and Recommendations, the Kentucky General Assembly has not elected to amend KRS Chapter 121 to replace the requirement of express advocacy with an "electioneering communication" standard. Further, the Final Report of the Advisory Task Force for Development of the Registry's Legislative Package, as adopted and amended by the Registry on September 19, 2005, expressed concern over the subjectivity of an electioneering communication standard and

declined to include such a change in its recommendations to the Kentucky legislature. As a result, the Registry has thereby recently affirmed the use of the Buckley bright-line test requiring explicit words directing readers to support or oppose a specific candidate.

Based on the facts provided in your request, the mass media communications in question do not explicitly call for the readers or viewers to vote for or against a clearly identified candidate. Therefore, the communications paid for by the Chamber do not expressly advocate the election or defeat of a candidate as set forth under Buckley and do not fall within the constitutionally-limited circumstances under which the Registry may regulate political speech. So long as the advertisements described in your request do not extend beyond issue discussion to express electoral advocacy, as illustrated in Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986), the Chamber will not be subject to registration and reporting as a permanent committee based solely on the described communications.¹

As to any other provisions under KRS Chapter 121, such issue-based communications, as proposed, would not constitute independent expenditures, as defined under KRS 121.015(6).² Further, such issue-based communications would not be subject to regulation under Kentucky's disclaimer statute under KRS 121.190(1).³

¹ KRS 121.015(3)(d) defines a permanent committee as "a group of individuals, including an association, committee or organization, other than a campaign committee, political issues committee, inaugural committee, caucus campaign committee, or party executive committee, which is established as, or intended to be, a permanent organization having as a primary purpose expressly advocating the election or defeat of one (1) or more clearly identified candidates, slates of candidates, or political parties, which functions on a regular basis throughout the year." (Emphasis added.)

² KRS 121.015(12) defines an independent expenditure as "the expenditure of money or other things of value for a communication which expressly advocates the election or defeat of a clearly identified candidate or slate of candidates, and which is made without any coordination, consultation, or cooperation with any candidate, slate of candidates, campaign committee, or any authorized person acting on behalf of any of them, and which is not made in concert with, or at the request or suggestion of any candidate, slate of candidates, campaign committee, or any authorized person acting on behalf of any of them." (Emphasis added.)

³ KRS 121.190(1) provides, in relevant part, that "[a]ll newspaper or magazine advertising, posters, circulars, billboards, handbills, sample ballots, and paid-for television or radio announcements, which expressly advocate the election or defeat of a clearly identified candidate, slate of candidates, or group of candidates for nomination or election to any public office shall be identified by the words "paid for by" followed by the name and address of the individual or committee which paid for the communication; except that if paid for by a candidate, slate of candidates, or campaign committee, it shall be identified only by the words "paid for by" followed by the name of the candidate, slate of candidates, or campaign committee, whichever is applicable." (Emphasis added.)

- (2) Does the statutory prohibition on the use of corporate funds under KRS 121.035 apply to the Chamber's proposed non-"express advocacy" communications?

Under Section 150 of the Kentucky Constitution and KRS 121.025, a corporation is prohibited from contributing, directly or indirectly, or otherwise giving anything of value to a candidate for public office in Kentucky. In addition, KRS 121.150(21) prohibits a candidate or committee from accepting a contribution from a corporation, directly or indirectly. The prohibitions against making and receiving corporate contributions apply to both monetary and in-kind contributions.

However, as discussed above, the Registry has limited regulatory authority over political communications pursuant to Buckley. The protected First Amendment rights are not diminished merely because the issue advocacy emanates from a corporate entity. As quoted in Kentucky Registry of Election Finance v. Louisville Bar Association, 579 S.W.2d 622, 627 (Ky.App. 1978):

If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.

The activity the Chamber proposes – expending corporate funds on mass media communications which do not endorse any candidate or expressly advocate the election or defeat of any candidate - does not fall within the regulatory jurisdiction of the Registry. Therefore, provided the communications do not go beyond issue discussion to express electoral advocacy and the Chamber does not otherwise give any money, service, or value to any candidate, the Chamber would not be in violation of KRS 121.025 or Section 150 of the Kentucky Constitution.

Please keep in mind that this advisory opinion is based on the specific facts set forth in your written request. If you have any questions concerning this advisory opinion, please do not hesitate to contact the Registry. Thank you.

Very truly yours,

Connie L. Verrill
General Counsel